

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 20, 2013

Elisabeth A. Shumaker
Clerk of Court

In re:

ROBERT JAY BERNHARDT,

Movant.

No. 13-1473
(D.C. Nos. 1:96:CR-00203-WJM-1 &
1:01-CV-00344-DBS)
(D. Colo.)

ORDER

Before **HARTZ**, **TYMKOVICH**, and **HOLMES**, Circuit Judges.

Robert Jay Bernhardt moves for authorization to file a second or successive 28 U.S.C. § 2255 motion challenging the sentences he received for federal drug and firearms offenses. *See id.* § 2255(h). We deny authorization.

Mr. Bernhardt first alleges that *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is both a new rule of constitutional law, *see* 28 U.S.C. § 2255(h)(2), and newly discovered evidence of his innocence of sentencing enhancements, *see id.* § 2255(h)(1). But *Alleyne* does not satisfy § 2255(h)(2) because the Supreme Court has not made it retroactive to cases on collateral review. *See In re Payne*, 733 F.3d 1027, 2013 WL 5200425, at *1-2 (10th Cir. Sept. 17, 2013). And it does not satisfy § 2255(h)(1) because it is a new legal opinion, not newly discovered evidence.

Mr. Bernhardt also cites *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). *McQuiggin*, however, addressed actual innocence in connection with an untimely *first* habeas application. *Id.* at 1934. Notably, in *McQuiggin* the Supreme Court

recognized that Congress, through 28 U.S.C. § 2244(b), intended to “modify” and “constrain[]” the role of “actual innocence” with respect to second or successive habeas applications. *See* 133 S. Ct. at 1933-34 (emphasis omitted). Congress similarly has limited the role of “actual innocence” with respect to second or successive § 2255 motions. *See* 28 U.S.C. § 2255(h)(1). Nothing in *McQuiggin* allows us to ignore the limitations set forth in § 2255(h).

The motion for authorization is denied. This denial of authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” *Id.* § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light blue grid background.

ELISABETH A. SHUMAKER, Clerk